

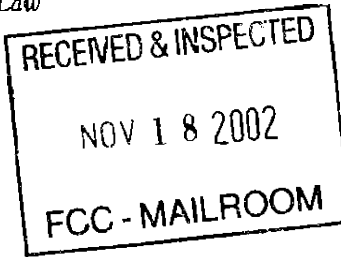
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November 11, 2002

Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 2054

Re: In the Matter of Rules and Regulations Implementing
the Telephone Consumer Protection Act of 1991
CG Docket No 02-278

Dear Sir or Madam,

Please find enclosed an original and five (5) copies of Comments on Behalf of the
Utility, Cable & Telecommunications Committee of the City Council of New Orleans
Please stamp-date one of the copies and return same to our office

With kindest personal regards, I am

Very truly yours,

MARK C. CARVER

MCC/mc
Enclosure

cc **Kelli Farmer (FCC)**

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CG Docket No 2-278

I. Introduction.

In light of new technological advances, deregulation and other matters affecting telecommunications and subscribers to telecommunication services, CNO has begun to take an active role in telecommunication proceedings before the Federal Communications

Commission, the Federal Trade Commission and the Louisiana Public Service Commission

II. General Statement Regarding the Telephone Consumer Protection Act.

Telephone subscribers have a fundamental right of privacy. That right of privacy,

however, has been significantly eroded by the rapid evaluation of information technology, which enables unwanted telephone solicitations to be targeted to people in their homes. The use of telephones for commercial solicitation is rapidly increasing. This form of communication offers unique benefits, but also entails special risks and the potential for abuse. Many citizens and businesses have lost money or suffered harm primarily as a result of telemarketing abuse. Such unwanted telephone solicitations can be an intrusive and disruptive nuisance, resulting in an invasion of the sanctity of the home, interrupting and disturbing the time that individuals spend with their families and friends, and disrupting the lives of persons who work non-standard hours and who care for small children, infants and the sick. For the general welfare of the public and in order to protect the integrity of the telemarketing industry, revising and strengthening the Telephone Consumer Protection Act of 1991 is necessary.

CNO believes that there is a legitimate public interest in protecting the privacy of subscribers who wish to avoid unsolicited and unwanted telephone solicitations. In fact, CNO played a significant role in the creation of the rules for Louisiana's Do Not Call Program.¹ In this regard, CNO respectfully submits the following comments to the whether the Federal Communication Commission's rules should be revised in order to

¹ La. R.S. 45:844.11 *et seq.*; Louisiana Public Service Commission General Order dated November 7, 2001.

more effectively carry out Congress' directives in the Telephone Consumer Protection Act of 1991²

111. Procedural Background of The Proceeding.

In 1992, the Commission adopted rules pursuant to the Telephone Consumer Protection Act of 1991 that restricted unsolicited advertising using the telephone and facsimile machine. Since that time, telemarketing practices and technological advances have changed significantly thereby increasing the public concern about the effect on consumer privacy.

On September 18, 2002, the FCC released a Notice of Proposed Rulemaking and Memorandum Opinion and Order (FCC 02-250) seeking comments on whether it should change its rules that restrict telemarketing calls and unsolicited faxes, and, if so, how. Specifically, the FCC seeks comment on whether to revise or clarify the rules governing unwanted telephone solicitations and the use of automatic telephone dialing systems, prerecorded or artificial voice messages, and telephone facsimile machines. The FCC also seeks comment on the effectiveness of company-specific do-not-call lists. In addition, the FCC seeks comment on whether to revisit the option of establishing a national do-not-call list and, if so, how such action might be taken in conjunction with the Federal Trade Commission's proposal to adopt a national do-not-call list and with various state do-not-call lists.³

² Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 USC § 227.

³ See *Telemarketing Sales Rule, Notice of Proposed Rulemaking*, Federal Trade Commission, 67 Fed. Reg. 4492 (January 30, 2002) (*FTC Notice*).

IV. Company Specific **Do Not Call Lists**.

The company-specific do-not-call approach is supposed to protect a residential telephone subscriber's privacy by requiring telemarketers to place a consumer on its do-not-call list if the consumer asks not to receive further solicitations from that specific company.⁴ The Commission had previously determined that the rules requiring commercial telemarketers to maintain their own do not call lists of consumers who do not wish to be called, sufficiently balanced consumers' privacy interests with Congress's instruction that telemarketing practices not be unreasonably hindered.⁵

Unfortunately, company-specific do-not-call lists do not prevent unsolicited telephone solicitations. Simply stated, in order for a consumer to be placed on the do-not-call list, the telemarketer must first call the consumer. (The first unsolicited telephone call is permitted under the current rules.) Under the company-specific do-not-call approach, consumers must repeal their request not to be called on a company-by-company basis as unsolicited telephone calls are received. Thus, company-specific do-not-call lists do not prevent unsolicited telephone solicitations. Therefore, the TCPA rules should be revised to prevent unwanted telephone solicitation without having to rely upon company-specific do-not-call lists to prevent such calls.

V. Network Technologies.

The Commission had considered whether to require telemarketers to use a special area code or telephone number prefix that would allow consumers to block such calls

⁴ 47 C.F.R. § 64.1200(c)(2)(iii).

⁵ *TCPA Order*, 7 FCC Rcd at 8763-67, paras. 20-24.

using an automatic number identification (ANI)" or a caller ID service. Based on the costs and technical barriers to implement these alternatives, however, the Commission had concluded that this solution was not the best means for accomplishing the objectives of the TCPA at that time.⁷

Requiring telemarketers to use a special area code or telephone number prefix that would allow consumers to block such calls may not be the best solution, but it is an alternative solution that would provide consumers with an additional method of preventing unwanted solicitations. If a consumer wishes to pay the cost of blocking such calls using an automatic number identification or a caller ID service, then the consumer should be given this option. The FCC should consider a special area code or telephone number prefix for telemarketers thereby giving consumers the opportunity to block such calls.

VI. Autodialers.

Telemarketers are using new technology such as autodialers, predictive dialers, and answering machine detection technology.

An autodialer ~~has~~ the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers. An autodialer can generate far more calls to residences than a telemarketer can manually.⁸

⁷ The term "ANI (automatic number identification) refers to the delivery of the calling party's billing number by a local exchange carrier to any interconnecting carrier for billing or routing purposes, and to the subsequent delivery of such number to end users. 47 C.F.R. § 64.1600(b).

TCPA Order. 7 FCC Red at 8762, para. 17 (noting that the more than 30,000 businesses engaged in telemarketing would be required to incur costs associated with changing their telephone numbers).

⁸ Representative Markey noted that "[t]oday in America, more than 300,000 solicitors make more than 18 million calls every day in the United States, while some 75,000 stock brokers make 1.5 billion telemarketing calls a year. Automatic dialing machines, on the other hand, have the capacity to call 20

In addition to automatically dialing numbers, predictive dialers are set up to "predict" the average time it takes for a consumer to answer the phone and when a telemarketer will be free to take the next call. When a consumer answers the telephone, a predictive dialer transfers the call to an available telemarketer. When a predictive dialer simultaneously dials more numbers than the telemarketers can handle, some of the calls are disconnected. The consumer may hear silence on the line as the call is being transferred or a "click" as the call is disconnected.⁹ Thus, when a live telemarketer is unavailable to make the sales pitch because the a predictive dialer simultaneously dialed more numbers than the telemarketer can handle, this technology will disconnect the phone call even if the consumer has actually taken the time to answer the phone.

Answering Machine Detection (AMD) technology permits phone calls to be monitored once they are answered.¹⁰ (The technology determines whether a live person answered the phone or whether an answering machine answered the phone.) Answering machine detection can be used along with automatic dialing systems to deliver telemarketing calls. **AMD** may either send a prerecorded message to an answering machine or transfer the call to a telemarketer once it detects that a customer has answered the call.

million Americans during the course of a single day, with each individual machine delivering a prerecorded message to 1,000 homes." 137 CONG. REC. H10,341 (Nov. 18, 1991).

⁹ Each telemarketing company can set its predictive dialer software for a predetermined abandonment rate (i.e., the percentage of hang-up calls the system will allow). The higher the abandonment rate, the higher the number of hang-up calls. High abandonment rates increase the probability that a customer will be on the line when the telemarketer finishes each call. It also, however, increases the likelihood that the telemarketer will still be on a previously placed call and not be available when the consumer answers the phone.

¹⁰ See DialAmerica Marketing, Inc.'s comments filed with the FTC at 19-20.

Technology such as autodialers, predictive dialers, and answering machine detection, is more annoying than speaking directly with a live telemarketer. Consumers answer their phone only to hear "dead air" while this technology determines: (1) whether an answering machine has answered the phone; (2) whether a live consumer has answered the phone; and (3) whether a telemarketer is available to make the sales pitch.

Even worse, when telemarketers desire to leave a **pre-recorded** message on the consumer's answering machine, this technology will disconnect the call if a consumer has answered the phone.

Additionally, leaving either a live or prerecorded solicitation on a consumer's answering machine should be a violation of the **TCPA**. Such recordings usually force a consumer to listen to the unwanted solicitation while reviewing his or her phone messages.

VII. Identification Requirements.

Commission regulations require that a person or entity making a telephone solicitation must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted.¹¹ Unfortunately, many telemarketers refuse to provide this information, or they provide false information (such as an alias). Additionally, autodialers, predictive dialers, and answering machine detection technology thwart the consumer's ability to obtain the identification of the

¹¹ 47 C.F.R. § 64.1200(e)(2)(iv).

telemarketer when the telemarketer uses this technology to disconnect calls answered by a live consumer

Identifying violators is most important when attempting to enforce the **TCPA**. How do you stop the non-compliant telemarketer if you do not know who it is? The rules should be revised so that the name given may not be an alias, but must be the legal name of the telemarketing company; The phone number given may not be answered by a recording, but must be answered by a live person during normal business hours; and The address given may *not* be a post office box, but must be the true physical address of the entity's business.

VIII. Commercial and Non-Commercial Calls.

The FCC also seeks comment on artificial or prerecorded messages containing offers for free goods or services (including free estimates or free analyses) and messages with "information-only" about products. The FCC also seeks comment about calls seeking people to help sell or market a business' products (a kind of "help wanted" message).¹²

Such calls should be considered "unsolicited advertisements." No sale is needed to be proposed to find that the call is a solicitation or advertisement. While these calls do not purport to sell something, they often contain messages advertising the quality of certain goods or services and are intended to generate future business. The definition of "unsolicited advertisements" should encompass free estimates, product surveys, free

¹² Another example of a "help wanted" call might include a message from an insurance company recruiting agents to help sell insurance policies.

offerings, and other such messages are intended to generate business. The term "unsolicited advertisement" should be broadly defined.

IX. Tax Exempt Nonprofit Organizations.

The TCPA excludes calls or messages by tax-exempt nonprofit organizations from the definition of "telephone solicitation."¹³ In addition, the Commission also determined that calls made by independent telemarketers on behalf of tax-exempt nonprofit organizations are not subject to our rules governing telephone solicitations.¹⁴ Now, the Commission is seeking comment on calls made jointly by nonprofit and for-profit organizations and whether these calls should be exempt from the restrictions on telephone solicitations and prerecorded messages. The Commission is not seeking comment on the exemption as it applies to political and religious speech whether conducted by nonprofit organizations or for-profit organizations on behalf of nonprofit organizations.

Telephone calls by independent telemarketers on behalf of tax-exempt nonprofit organizations should be subject to the rules governing telephone solicitations. Often such calls are sales pitches for commercial products or services.

If a nonprofit organization calls consumers to sell another company's product and receives a portion of the proceeds, then such a phone call should be subject to the telemarketing rules. If a nonprofit organization utilizes the services of a telemarketer, then

¹³ 47 U.S.C. § 227(a)(3)(C). The Commission later clarified that telemarketers who solicit on behalf of tax-exempt nonprofit organizations also are not subject to the rules governing telephone solicitations. See 1995 *TCPA Reconsideration Order*, 10 FCC Rcd at 12397, para. 13.

¹⁴ See 1995 *TCPA Reconsideration Order*, 10 FCC Rcd at 12397, para. 13.

such a phone call should be subject to the telemarketing rules; and Any commercial solicitation by a non-profit organization should also be subject to the rules

X. Established Business Relationship.

In the *TCPA Order*, the Commission determined that the **TCPA** permits an “established business relationship” exemption from the restrictions on artificial or prerecorded message calls to residences.¹⁵ The Commission concluded that a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests.¹⁶ The Commission defined the term “established business relationship” to mean “a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.”

An “established business relationship” should not permit a telemarketer to make unsolicited and unwanted telephone calls to the consumer. A consumer should not have to abandon his business relationship in order to prevent unsolicited calls. For example, if a consumer purchases a magazine from a publisher/telemarketer, this should not give the publisher/telemarketer the unfettered right to continue to call the consumer day-after-day to pitch additional magazines to him, especially if the consumer requested to be placed on the company-specific do-not-call list or a state regulated do-not-call list.

¹⁵ See *TCPA Order*, 7 FCC Rcd at 8770, para. 34; 47 C.F.R. § 64.1200(c)(3).

¹⁶ See *TCPA Order*, 7 FCC Rcd at 8770, para. 34.

¹⁷ 47 C.F.R. § 64.1200(f)(4).

XI. Unsolicited Facsimile Advertisements.

The **TCPA** prohibits the transmission of unsolicited advertisements by telephone facsimile machines and requires those sending any messages via telephone facsimile machines to identify themselves to message recipients

Unsolicited advertisements by fax are not only an inconvenience to consumers, but they waste money, time and interfere with crucial businesses operations. Clearly, like the telephone, the intent of the facsimile machine is to communicate with friends, family, and business partners. Neither the telephone nor the facsimile machine is not open invitations for unsolicited advertisements which inconvenience the consumer, block the phone lines, increase a business's operating budget, waste facsimile paper and ink or toner. Unsolicited faxes illegally shift the cost of advertising onto the consumer.

Stricter enforcement and greater civil penalties should significantly deter unsolicited facsimile advertisements. Specifically, the **TCPA** should explicitly permit class action lawsuits against violators of the **TCPA**; The definition of "unsolicited facsimile advertisements" should encompass free estimates, product surveys, free offerings, and other such messages are intended to generate business; Facsimiles by independent telemarketers on behalf of tax-exempt nonprofit organizations should be subject to the rules governing unsolicited facsimile advertisements; and An "established business relationship" should not permit a telemarketer to send unsolicited and unwanted facsimiles to the consumer

XII. Wireless Telephone Numbers.

The **TCPA** and the Commission's rules specifically prohibit telephone calls using an autodialer or an artificial or prerecorded voice message to any telephone number

assigned to a paging service, cellular telephone service, or any service for which the called party is charged for the call, except in emergencies or with the prior express consent of the called party¹⁸ The Commission's rules also state that live telephone solicitations to residential telephone subscribers must comply with time of day restrictions and must institute procedures for maintaining do-not-call lists. The Commission has not opined on whether wireless subscribers or a subset thereof are "residential telephone subscribers" for purposes of these restrictions¹⁹

Many wireless consumers purchase large "buckets" of minutes at a fixed rate. Exceeding the number of minutes can be extremely expensive. Thus, wireless consumers are very conscious of the number of minutes they use. Receiving unsolicited telephone advertisements on wireless phones is not only an invasion of the consumer's privacy, but it also can be costly for the consumer. Unsolicited telephone advertisements (either by voice or text message) to wireless phones should be prohibited, except in emergencies or with the prior express consent of the called party.

XIII. Enforcement.

The TCPA cannot be all bark and no bite. Effective enforcement is the best deterrence for violations of the **TCPA**. Individuals should be able to bring private rights of action against teleinmarketers who violate the **TCPA**. However, litigation should be cost effective for the consumer. For example, civil remedies for violations should include minimum monetary damages (*e.g.*, \$500.00), actual damages, attorneys' fees, court costs,

¹⁸ 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii)

¹⁹ 47 C.F.R. § 64.1200(c)

and injunctions. Additionally, class action lawsuits against telemarketers for violations of the **TCPA** should be explicitly permitted by the rules.

XIV. National Do Not Call List.

Pursuant to section 227(c)(3) of the TCPA, the Commission “may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase.”²⁰ The Commission seeks comment on whether it should revisit its determination not to adopt a national do-not-call list. Clearly, a National Do Not Call List would provide consumers with a one-step method for preventing telemarketing calls, and the Commission should adopt an nationwide Do Not Call list.

The rules for that the Commission adopt must fully facilitate the consumer’s ability to protect his or her right of privacy and avoid unsolicited and unwanted telephone solicitations. The rules should achieve the following objectives:

- (1) Being placed on the Do Not Call List should be effortless and uncomplicated,
- (2) Remaining on the Do Not Call List should be continual and perpetual; and
- (3) ,Avoiding telephone solicitations should be realized and achieved.

Once the objectives are recognized, the rules can then be formulated to obtain those objectives. The Utility, Cable & Telecommunications Committee of the City

²⁰ 47 U.S.C. § 227(c)(3)

Council of New Orleans proposes several recommendations to accomplish these goals.

These recommendations are discussed in further detail herein. to-wit:

- The consumer should pay no charge or fee to be placed on the Do Not Call List.
- The consumer's telephone number should remain on the Do Not Call list until his phone is disconnected or until he requests his number to be removed from the List
- The consumer should be able to place his telephone number on the Do Not Call List by using an Internet Online application, a toll-free telephone number, U S Mail or facsimile
- There should be very limited exceptions to the definition of "telephone solicitation."
- Telemarketers should be required to obtain updated Do Not Call lists every month
- Telemarketers should have access to the Do Not Call lists either **by** the Internet, printed copies or CD-ROMs.

Since the rules of the Do Not Call program should be most advantageous to the consumer, a telephonic subscriber should not be required to pay a fee or charged to be placed on the Do Not Call list. The Commission should seriously consider not collecting any fee or charge from residential subscribers. The costs of administering the Do Not Call program should be borne by the telephone solicitors. Consumers should not be required to pay for their own privacy. If businesses want to use the telephone as a means to solicit customers, then they should bear the costs of respecting a residential telephone subscriber's right of privacy. Thus, telephone solicitors should subsidize the cost of establishing and administering a national Do Not Call List. Specifically, telemarketers should be required to pay a fee for the do-not-call list in an amount sufficient to administer and manage the database.

In Louisiana, the Do Not Call law originally required the consumer to pay a \$5.00 fee to be placed on the do-not-call list.²¹ However, the Louisiana Public Service Commission which was tasked to develop the rules and regulations necessary to implement Louisiana's Do Not Call law determined that the cost to collect the \$5.00 fee would be almost as much as the revenues generated by the fee. Thus, the Louisiana Public Service Commission chose not to require any fee from consumers.²²

Before the Federal Communications Commission requires any such fees, it should seriously consider the cost and expense to collect and manage the fees. The Commission may find that it may be more cost effective not to require any fees from consumers.

The consumers' telephone number should remain on the do not call list until his phone is disconnected or until he requests that his number be removed from the list. Again, being placed on the Do Not Call List, and remaining on the List, should be effortless and uncomplicated. Naturally, requiring a person to register his telephone number only once would facilitate the subscriber's ability to avoid unsolicited and unwanted telephone solicitations.

The consumer should be able to place his telephone number on the do not call list by using an internet online application, a toll-free telephone number, u.s. mail or facsimile. Since registering phone numbers to the Do Not Call List should be effortless and uncomplicated, consumers should have available to them as many options as possible to take advantage of the nationwide Do Not Call registry. Methods of registration should

²¹ La. R.S. 45:844.14(A)(1) stated that "any residential telephonic subscriber desiring to be placed on a "do not call" listing shall be placed on that listing upon the commission's receipt of a request form and payment of a five-dollar initial listing charge."

²² Louisiana Public Service Commission General Order dated November 7, 2001.

include the following. an Internet online application. a toll-free telephone number, U S mail and facsimile Once again, the opportunities to participate in this Program should be plentiful. Additionally, the Commission should develop a website whereby subscribers can

- register their phones at no cost.
- get a detailed explanation of the Do Not Call List and how it works,
- get answers to frequently asked questions.
- verify that their number is on the list,
- view the legislation establishing the Do Not Call List, and
- file complaints when they receive telemarketing calls.

Naturally. the Do Not Call registry will only be successful if telephone subscribers are adequately notified of the registry and are given sufficient opportunity to place their telephone numbers on the do-not-call list.

There should be very limited exceptions to the definition of "telephone solicitation." Obviously, the individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices In order to achieve this balance, then there should be exceptions to the do-not-call list. However, the exceptions should be very limited

Only the following communications should be exempted from the do-not-call list rules

- (1) In response to an express request of the person called.

- (2) Primarily in connection with an existing debt *or* contract, payment or performance of which has not been completed at the time of such call.
- (3) On behalf of an organization which has nonprofit status under Section 501(c)(3) or (6) of the Internal Revenue Code, unless such organization utilizes the services of a paid professional solicitor, unless such organization is selling another company's product and receives a portion of the proceeds or unless the organization is making a commercial solicitation
- (4) For the purpose of conducting marketing research, public opinion polling, or similar activities that do not involve telephonic solicitation or selling
- (5) Constituting political or religious activity

Expanding the types of telephone communications which would be exempt from the Do Not Call List would surely diminish the value and benefit of a nationwide do-not-call registry and further undermine or lessen a person's right of privacy.

Telemarketers should be required to obtain updated do not call lists every month. Consumers should be able to receive the immediate benefit and protection of a national do-not-call list. For example, if the Commission's rules required the do-not-call list to be updated quarterly, then, consequently, many consumers may have to wait three months before realizing the protections of the Do Not Call List. Any rules that the Commission adopts should require that the database is updated on a monthly basis, and telemarketers should be required to obtain an updated list each month.

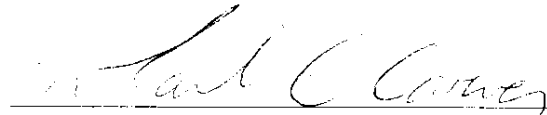
Telemarketers should have access to the do not call lists either by internet, printed copies or cd-roms. In order for the Do Not Call List to be effective, telemarketers will need to have quick and easy access to the database. Telemarketers should have every plausible means of accessing the list, such as by email, CD-rom or printed copies of the list. An additional means of access to the Do Not Call List database could be the creation

of an online database whereby, via a password, telephone solicitors could have unlimited electronic access to the database for an annual fee

XV. Conclusion.

The Commission should adopt the suggestions made herein to avoid unwanted and unsolicited telephone solicitations. The rules adopted must provide significant advantages and benefits for telephone subscribers. Furthermore, violations of the TCPA should be strongly deterred through strong, aggressive enforcement.

Respectfully submitted:



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